Superintendent of Lands and Surveys, Kota Samarahan Division & Anor v Luking ak Uding & Ors and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS Q-01–164 OF 2011, Q-01–166 OF 2011, Q-02–756 OF 2011, Q-01–137–03 OF 2012 AND Q-01–136–03 OF 2012

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Land Law — Customary land — Right to — Whether practice of pemakai menoa and garis menoa by Iban natives of Sarawak were recognised customs/usage which had force of law conferring native customary rights to land

The respondents in the five appeals herein were Iban natives of Sarawak who had sought declaratory reliefs and orders in two suits in the High Court against the various appellants for interfering with their native customary rights ('NCR') over land. In both the suits, the respondents claimed the authorities had granted provisional leases over land to the appellants concerned which included part of their NCR lands. The issues that were common in the instant appeals were (a) whether Sarawak native customary law recognised the practice of *pemakai menoa* (virgin jungle, usually situated near aboriginal settlements, where natives hunted wildlife and obtained jungle produce for their sustenance and other needs) as giving rise to NCR over land and (b) whether the appellants had proven their NCR claims. The trial courts which heard the two suits ruled that the respondents had proven their claims on balance of probabilities and granted the reliefs sought including a directive to the state government to rectify the land register to exclude NCR lands from the provisional leases. At the hearing of the instant appeals, counsel for the Sarawak State Attorney General's Chambers argued that NCR could not be created over riverbank reserves, as claimed by some of the appellants, and that the acquisition of NCR to land under Sarawak law did not include the practice of *pemakai menoa* but only *temuda* (land cultivated after felling of virgin jungle and in continuous occupation by natives). The respondents argued that *pemakai menoa* and *garis menoa* were long-standing Iban custom/usage which had the status of law under art 160(2) of the Federal Constitution ('the Constitution') which defined law to include 'customs or usage having the force of law in the Federation or any part thereof'.

Held, dismissing the five appeals:

(1) The arguments by the appellants to persuade the court to decide that the Iban custom of creating *pemakai menoa* did not have the force of law

under Sarawak laws were the same arguments that were raised in *Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 6 MLJ 241. Those arguments were rejected by the High Court in that case and, on appeal, the Court of Appeal affirmed the High Court's decision in *Superintendent of Lands and Survey, Bintulu v Nor Anak Nyawai & Ors and another appeal* [2006] 1 MLJ 256. The expression 'having the force of law' in art 160 of the Constitution must not be read to be confined only to statute law or legislative orders but must also encompass Malaysian common law developed through the cases decided by our courts especially the appellate and the apex court (see paras 47 & 51).

(2) As to whether the respondents had proven their claims for NCR, the respective trial judges had heard and recorded the evidence of the witnesses, particularly the respondents' witnesses, firsthand. They believed and accepted their evidence. In the circumstances, the appellate court should be slow in departing from the trial judge's finding and conclusion of facts based on the evidence. The creation of *pemakai menoa* and the fixing of the *garis menoa* were largely a determination and finding of facts by the trial judge. There was ample evidence for the trial judge to conclude that the respondents had proved and established their NCR to the disputed areas of land before 1 January 1958. However, land which formed the river reserves ought to be excluded from the claimed area (see paras 57 & 62–63).

[Bahasa Malaysia summary

Responden-responden dalam lima rayuan ini adalah kaum Iban, anak negeri Sarawak yang memohon relief perisytiharan dan perintah-perintah dalam dua tindakan di Mahkamah Tinggi terhadap pelbagai perayu kerana campur tangan dengan hak adat anak negeri mereka ('HAAN') ke atas tanah. Dalam kedua-dua tindakan, responden-responden mendakwa bahawa pihak berkuasa telah memberikan pajakan sementara ke atas tanah kepada perayu-perayu berkenaan yang mana termasuk bahagian tanah HAAN mereka. Isu-isu yang biasa dalam rayuan-rayuan ini adalah (a) sama ada undang-undang adat anak negeri Sarawak menerima amalan pemakai menoa (hutan dara, biasanya terletak berdekatan penempatan orang asli, di mana anak negeri memburu hidupan liar dan mendapatkan hasil hutan bagi makanan dan keperluan lain mereka) untuk membangkitkan HAAN ke atas tanah dan (b) sama ada perayu-perayu telah membuktikan tuntutan HAAN mereka. Mahkamah perbicaraan yang mendengar kedua-dua tindakan tersebut memutuskan bahawa responden-responden telah membuktikan tuntutan mereka atas imbangan kebarangkalian dan memberikan relief yang dipohon termasuk arahan kepada kerajaan negeri untuk memperbetulkan daftar tanah untuk mengecualikan tanah-tanah HAAN daripada pajakan sementara. Pada pendengaran rayuan-rayuan ini, peguam bagi Jabatan Peguam Negara Negeri Sarawak berhujah bahawa HAAN tidak boleh dibentuk ke atas tanah

simpanan tebing sungai, seperti yang dituntut oleh beberapa perayu, dan bahawa pengambilan HAAN terhadap tanah tersebut di bawah undang-undang tidak termasuk amalan pemakai menoa tetapi hanya temuda (tanah yang dikerjakan selepas penebasan hutan dara dan dalam penempatan berterusan oleh anak negeri). Responden-responden berhujah bahawa pemakai menoa dan garis menoa adalah penggunaan/adat sekian lama Iban yang mempunyai status undang-undang di bawah perkara 160(2) Perlembagaan Persekutuan ('Perlembagaan') yang mentafsirkan undang-undang untuk memasukkan 'customs or usage having the force of law in the Federation or any part thereof'.

Diputuskan, menolak kelima-lima rayuan:

(1) Hujahan oleh perayu-perayu untuk memujuk mahkamah memutuskan bahawa adat Iban dalam membentuk pemakai menoa tidak mempunyai penguatkuasaan undang-undang di bawah undang-undang Sarawak adalah hujahan yang sama yang dibangkitkan di dalam kes *Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 6 MLJ 241. Hujahan tersebut ditolak oleh Mahkamah Tinggi dalam kes tersebut dan, atas rayuan, Mahkamah Tinggi mengesahkan keputusan Mahkamah Tinggi dalam kes *Superintendent of Lands and Survey, Bintulu v Nor Anak Nyawai & Ors and another appeal* [2006] 1 MLJ 256. The expression 'having the force of law' dalam perkara 160 Perlembagaan tidak boleh dibaca untuk hanya terhad kepada undang-undang statut atau perintah-perintah perundangan tetapi mesti juga melingkungi *common law* Malaysia yang dibangunkan melalui kes-kes yang diputuskan oleh mahkamah kita terutamanya mahkamah rayuan dan mahkamah agung (lihat perenggan 47 & 51).

(2) Mengenai sama ada responden-responden telah membuktikan tuntutan mereka bagi HAAN, hakim perbicaraan masing-masing telah mendengar dan merekodkan keterangan saksi-saksi, terutamanya secara langsung saksi-saksi responden-responden. Mereka mempercayai dan menerima keterangan mereka. Dalam keadaan ini, mahkamah rayuan perlu perlahan-lahan dalam menyimpang daripada dapatan dan kesimpulan fakta berdasarkan atas keterangan oleh hakim perbicaraan. Pembentukan pemakai menoa dan penetapan garis menoa sebahagian besarnya penentuan dan dapatan fakta oleh hakim perbicaraan. Terdapat keterangan yang banyak bagi hakim perbicaraan untuk memutuskan bahawa responden-responden telah membuktikan HAAN mereka terhadap kawasan tanah yang dipertikaikan sebelum 1 Januari 1958. Walau bagaimanapun, tanah yang membentuk simpanan sungai patut dikecualikan daripada kawasan yang dituntut (lihat perenggan 57 & 62–63).]

Notes

For cases on right to customary land, see 8(2) *Mallal's Digest* (5th Ed, 2015) paras 3389–3395.

Cases referred to

Agi ak Bungkong & Ors v Ladang Sawit Bintulu Sdn Bhd & Ors [2010] 4 MLJ 204, HC (refd)
Anyam & Anor v Intan [1948–1949] supp MLJ 13 (refd)
Bisi ak Jinggot @ Hilarion Bisi ak Jenggut v Superintendent of Lands and Surveys Kuching Division & Ors [2013] 5 MLJ 149, FC (refd)
Galau & Ors v Penghulu Imang & Ors [1967] 1 MLJ 192 (refd)
Haji Mansur bin Duseh alias Matso bin Duseh decd, In Re [1940] 1 MLJ 110 (refd)
Hamit b Matussin & 6 Ors v Superintendent of Lands & Surveys & Anor [1991] 2 CLJ 1524, HC (refd)
Injing v Tuah & Anor [1971] 1 MLJ 115 (refd)
Kho Kwang Choon v Phuman Singh [1968] 1 MLJ 183 (refd)
Luking Uding & Ors v Superintendent Of Lands and Surveys Kota Samarahan Division & Ors [2011] 7 CLJ 342, HC (refd)
Mohamad Rambli bin Kawi v Superintendent of Lands Kuching & Anor [2010] 8 MLJ 441, HC (refd)
Muli Anak Baya & Anor v Everbright Enterprise Sdn Bhd Civil Suit No 21–6 of 2009 (unreported), HC (refd)
Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors [2001] 6 MLJ 241, HC (refd)
Sagong bin Tasi & Ors v Kerajaaan Negeri Selangor & Ors [2002] 2 MLJ 591, HC (refd)
Sumbang ak Sekam v Engkarong ak Ajah [1958] SCR 95 (refd)
Superintendant of Land And Surveys Miri Division And Anor v Madeli bin Salleh (suing as Administrator of the Estate of the deceased, Salleh bin Kilong) [2008] 2 MLJ 677; [2007] 6 CLJ 509, FC (refd)
Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal [2006] 1 MLJ 256; [2005] 3 CLJ 555, CA (refd)
TR Gayan Anak Tupai & Ors v Vita Hill Sdn Bhd & Ors Civil Suit No 21–4 of 2009 (unreported), HC (refd)
Usang Labit & 3 Ors v Rosebay Enterprise Sdn Bhd & 2 Ors Civil Suit No 21–1 of 2010 (unreported), HC (refd)

Legislation referred to

Evidence Act 1950 s 48, 101(1)
Federal Constitution arts 8(1), 160, 160(2)
Fruit Trees Order 1989
Land Order 1920 (repealed by Land Order 1931) ss 2, 21
Land Settlement Ordinance (Cap 28) (repealed by Sarawak Land Code) s 66

Native Courts Ordinance (Cap 43) (1958 Ed)
Probate and Administration Enactment (repealed by Probate and Administration Act 1959) s 184(iii)
Sarawak Land Code (Cap 81) ss 5(2), 38(1), 132
Sarawak Limitation Ordinance (Cap 49)

Appeal from: Suit Nos 22–43 of 2002-I and 22–249 of 1998-III(I) (High Court, Kuching)

JC Fong (Saferi bin Ali and Nur Azhar bin Bujang with him) (State Legal Counsel, Sarawak State Attorney General's Chambers) in Civil Appeal Nos Q-01–164 of 2011 and Q-01–136–03 of 2012) for the appellants.
Shankar Ram Asnani (Daniel Ling with him) (Thomas Ram & Co Advocates) in Civil Appeal Nos Q-01–166 of 2011 and Q-02–756 of 2011 for the appellant.
Mohd Ivan bin Hussein (Ivan Hussein) in Civil Appeal No Q-01–137–03 of 2012 for the appellants.
Harrison Ngau (HNL & Co) in Civil Appeal Nos Q-01–164 of 2011, Q-01–166 of 2011 and Q-02–756 of 2011 for the respondents.
Baru Bian (Joshua Parir Baru with him) (Baru Bian & Co) in Civil Appeal Nos Q-01–137–03 of 2012 and Q-01–136–03 of 2012 for the respondents.
Arthur Lee (Arthur Lee Lin & Co) in Civil Appeal Nos Q-01–164 of 2011 for the first intervener.
Albert Tang Yew Liong (Albert Tang Advocates) in Civil Appeal No Q-01–164 of 2011 for the second intervener.
Arthur Lee (Arthur Lee Lin & Co) in Civil Appeal Nos Q-01–166 of 2011, Q-02–756 of 2011, Q-01–137–03 of 2012 and Q-01–136–03 of 2012 for the interveners.

Abdul Aziz Abdul Rahim JCA:

[1] There are five appeals before us. These five appeals arose from two separate decisions by two different High Court judges sitting at Kuching and involving two different groups of Iban natives. One decision was by Linton Albert J and the other was by Clement Skinner J.

[2] The appeals are: Appeal No Q-01–164 of 2011 ('Appeal No 164'), Appeal No Q-01–166 of 2011 ('Appeal No 166') and Appeal No Q-02–756 of 2011 ('Appeal No 756'). This first three appeals are related and they arose from the decision of Linton Albert J in Kuching Suit No 22–43 of 2002-I. The other two appeals are Appeal No Q-01–136–03 of 2012 ('Appeal No 136') and Appeal No Q-01–137–03 of 2012 ('Appeal No 137'). These two appeals arose from the decision of Allan Clement Skinner J in Kuching Suit No 22–249 of 1998-III(I). For the purpose of this judgment, we will group these five appeals into two groups according to their original High Court decision. The first group is the appeals against the decision by Linton Albert J and we will call this

group of appeals 'the Luking appeals' and the second group is the appeal against the decision by Clement Skinner J and we will name this group of appeals 'the Nyutan appeals'.

[3] The appellants in Appeals No 164 are the Superintendent of Lands And Surveys Kota Samarahan Division and the Government of the State of Sarawak (the first and second defendants respectively before the High Court). In Appeal No 166 the appellant is Lembaga Pembangunan dan Lindungan Tanah (the third defendant before the High Court). The appellant in Appeal No 756 is Nirwana Muhibbah Sdn Bhd (the fourth defendant in the High Court). The respondents in this appeal are the plaintiffs before the High Court.

[4] The appellant in Appeal No 136 is the State Government of Sarawak (the third defendant in the High Court). The respondents are the plaintiffs in the High Court.

[5] The appellants in Appeal No 137 are Lembaga Pembangunan dan Lindungan Tanah (Land Custody and Development Authority) – the first defendant in the High Court, and Nirwana Muhibbah Sdn Bhd – the second defendant in the High Court.

[6] There are three interveners in these five appeals. The first intervener is TH Pelita Sadong Sdn Bhd. The second intervener is TH Pelita Gedong Sdn Bhd and the third intervener is RHB Islamic Bank.

[7] The issues in all the five appeals are the same as between the plaintiffs/respondents and the defendants/appellants with a slight variance in respect of issues involving the interveners. By consent of the parties, all the five appeals were heard together.

[8] We have decided to write only one judgment for all the five appeals in the light of their common issues.

[9] For ease of reference, the parties in these appeals will be referred to as they were before the High Court except for the interveners which we shall refer to by the names.

[10] The first thing to note about these appeals is that the two appeals involve the natives of Sarawak of Iban origin, and who as the plaintiffs claimed native customary rights ('NCR') over large tract of land covered under the provisional lease issued by the first and second defendants to the third and fourth defendants in the Luking and Nyutan appeals. However, the NCR claim in both the Luking and Nyutan appeals somewhat overlaps. The second

thing to note is that in both group of appeals the issues which require our determination are common. The first issue in the nutshell is whether Sarawak Native Customary Law recognise 'pemakai menoa' (that is land area – mostly uncultivated virgin jungle – where the natives roam for their hunting of animals and jungle produce) as part of Sarawak natives customary rights or NCR. The second issue is whether the plaintiff had proven their NCR claim.

[11] With the foregoing brief introduction, we will now address the salient facts in each group of the appeals, the submissions by the parties and follow by the discussion on issue for determination and the evidence. The discussion on the issues will be common to both groups of appeals.

The Luking appeals

[12] In the High Court, this case was registered as Suit No 22–43 of 2002-I. In this case Luking ak Uding, Simah ak Empaling and Nyambar ak Suwat were the plaintiffs and they were suing on behalf of themselves and all the residents of the longhouse known as Kampung Marakai or rumah luang and/or all other proprietors, occupiers, holders or claimants of native customary rights lands situate at or around Kampung Marakai, Sungei Marakai, Batang Krang, Gedong, Simunjan, Kota Samarahan Division, Sarawak. The first defendant was the Superintendant of Lands And Surveys Kota Samarahan Division. The second defendant was the Government of the State of Sarawak. The third defendant was Lembaga Pembangunan Dan Lindungan Tanah and the fourth defendant was Nirwana Muhibbah Sdn Bhd, a Malaysian registered company which held the provisional lease issued by the first defendant.

[13] The plaintiffs claimed that they have acquired NCR over land which is under provisional lease issued by the first and second defendants to the third and fourth defendants as co-owners. The total area under the provisional lease described as Lot 2979 is 3,880 hectares. The whole area is identified and de-alienated in a map which was attached to the statement of claim. An identical map to the one exhibited in the plaintiffs' statement of claim was admitted as exh P13. The learned judge found that the first and second defendants did not dispute the area claimed by the plaintiffs because the defendants exh D5 – a map which shows that the area claimed as NCR – was within the area covered by the provisional lease.

[14] The plaintiffs contend, inter alia, that the issuance of the provisional lease extinguishes their NCR over the land covered by the provisional lease with no provision for compensation. The plaintiffs therefore are seeking various declaratory reliefs and orders against the defendants.

[15] As a matter of evidence, the learned judge accepted the testimony and

evidence of PW2, Nicholas Bawin ak Anggat, the expert on Iban *adat* and customs on the creation of NCR, in particular the creation of *pemakai menoa* and the determination or fixation of 'garis menoa'. PW2 is ethnic Iban and had served as Deputy Head of the Majlis Adat Istiadat Sarawak from 12 August 1992 to 28 February 2005. His knowledge of Iban custom and tradition was from his personal experience and observation. He was born and brought up in his long house and had done research and study on adat Iban through well documented materials and records by well known authors such as D Freeman, Kedit, Dr Dimbab Ngidang and Benedict Sandin. PW2 was the same expert that gave expert evidence in the celebrated case of *Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 6 MLJ 241. His evidence on adat Iban was approved by the Federal Court in *Superintendant of Land And Surveys Miri Division And Anor v Madeli bin Salleh (suing as Administrator of the Estate of the deceased, Salleh bin Kilong)* [2008] 2 MLJ 677; [2007] 6 CLJ 509. PW2 testified that:

> ... native customary law, customs and traditions are synonymous and they embody the whole spectrum of their way of life, practices, rituals, ceremonies and conversations including oral tradition whereby the Ibans construct social memory relating to every aspect of their past which are relevant to the forest which included genealogies and boundary markings. These customs and traditions are not exhaustively codified. The pioneering families in the days of old would clear virgin forest for farming which established their rights to the cleared area including the forests within and around the cleared area called 'Pemakai Menoa' which in time became an area within a defined boundary called 'garis menoa' within which are the individual farms, farmlands and gardens of the inhabitants of a particular longhouse or village including communal land like cemeteries and islands of forest left uncleared for the inhabitants to collect jungle produce and obtain timber. Where there are several pioneering villages or longhouses their respective 'Pemakai menoa' are separated by defined boundaries or 'garis menoa'. Permanent landmarks would constitute those boundaries which included streams, rivers, watersheds, hills, ridges and mountains. Disputes on land boundaries or 'garis menoa' were resolved by village chiefs and elders. Farmlands left fallow are called 'Temuda' because the Iban practice a system of farming where farmland is left for a number of years before a particular farmland is again farmed. The right to farm 'temuda' land is with the person who first felled the virgin forest.

[16] Having considered and assessed the evidence given by both the plaintiffs and the defendants' witnesses, the learned trial judge held that none of the defendants' witnesses contradicted in any material particular the evidence adduced by the witnesses for the plaintiffs. With regard to the acquisition of the NCR by the plaintiffs over the disputed, the learned trial judge said that:

> Since the plaintiffs claim to native land under native customary rights was acquired prior to 1 January 1958 the strictures imposed by the (Sarawak) Land Code for the creation of native customary rights over land after that date have no application and do not, therefore, fall to be determined.

[17] With regard to the creation of the plaintiffs *pemakai menoa* and the *garis menoa*, the learned judge said as follows:

> In this action, quite apart from proof established by exh P13, proof of the plaintiff's pemakai menoa was readily available from the oral testimonies of their witnesses which are adumbrated above coupled with the evidence of DW4 who was understandably untruthful as to the size of the cleared area of 38 hectares, nevertheless, showed that the plaintiffs had been in occupation within their pemakai menoa since 1954.

[18] Applying the principles laid down in *Nor Anak Nyawai & Ors* on the creation of *pemakai menoa* which based primarily on continuous occupation of the land in question to the facts and evidence in the Luking appeals, the learned judge concluded as follows:

> It was never remotely suggested that the plaintiffs and their ancestors had 'roamed or foraged' the areas in their 'pemakai menoa' in search of food. It was clear that the plaintiffs from the time of their ancestors had been in occupation of their 'pemakai menoa' which followed a defined boundary based on permanent landmarks which separated Kampung Merakai from the 'pemakai menoa' of neighbouring villages whose own 'pemakai menoa' were contiguous to that of Kampung Merakai and witnesses from these other villages gave credible testimony of the long established 'garis menoa' delineating the 'pemakai menoa' from their respective ancestors. Thus, applying the principles I have set out to the evidence adduced by the plaintiffs and the defendants adumbrated I am satisfied that it is more probable than not that the plaintiffs have established their native customary rights to the 'pemakai menoa' which they claim, in accordance with the civil standard of proof required under s 101(1) of the Evidence Act 1950 which states:
>
> > Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.
>
> In the circumstances, the defendants' contention that the plaintiffs do not have customary rights over the land claimed or that the same falls outside the provisional lease are demolished because quite apart from the precise delineation set out in exh P13, the description of the plaintiffs' 'pemakai menoa' given by their witnesses contain sufficient particulars to demarcate the plaintiffs' 'pemakai menoa' with the degree of certainty to sustain their claim over the 'pemakai menoa' which is clearly within part of the provisional lease issued on the first and second defendants under Lot 2979 Melikin Land District.

[19] On that conclusion and finding, the learned trial judge in Luking appeals granted the declarations sought by the plaintiffs in their suits.

The Nyutan appeals

[20] In the High Court, this case was registered as High Court Suit No 22–249 of 1998-III(I). In this case, TR Nyutan ak Jami, Gangak ak Guma

and Langa ak Kama were the plaintiffs. They were suing for and on behalf of themselves and 183 other residents of Kampong Lebor, Jalan Gedong, 94700 Serian Sarawak. The first defendant Lembaga Pembangunan dan Lindungan Tanah (Land Custody and Development Authority) and the second defendant Nirwana Muhibbah Sdn Bhd were the provisional holder of the disputed land and the third defendant was the State Government of Sarawak which had issued the provisional lease.

[21] The plaintiffs in this group of appeals are also Iban by race and natives of Sarawak. They are residents of Kampong Labor, Jalan Gedong, Serian, Kuching and claim that prior to 1 January 1958 they and their forefathers had acquired NCR over areas of land which included about one kilometer along both banks of Sungei Tampoi ('the Sungei Tampoi land') some parts of along Sungei Krang ('the Sungei Krang land') and at Sungei Meringgang ('the Sungei Meringgang land').

[22] The plaintiffs claim that their ancestors had occupied and cultivated their native customary lands since the rule of the Brunei Sultanate to whom a tribute was paid. The plaintiffs say they are still in occupation of those lands today.

[23] The first and second defendants in Nyutan appeals are the registered co-proprietors of three parcels of land namely Lot 2 Block 6 Melikin Land District ('Lot 2'), Lot 166 Block 5 Melikin Land District ('Lot 166') and Lot 7 Block 3 Melikin Land District (which later change to Lot 2979 ('Lot 7'). The three parcels of land were alienated to first and second defendants by the third defendant.

[24] The plaintiffs in Nyutan appeals claim that parts of their native customary land have been included in the three parcels of land alienated to the first and second defendants. The plaintiffs claim that when the first and second defendants entered the three parcels and began clearing works for oil palm plantation in early 1997 they destroyed the plaintiffs' crops. The plaintiffs claim the first and second defendants' intrusion and destruction of their crops on the three parcels was unlawful and without their consent or without their NCR over the land being first extinguished or without the payment of any compensation.

[25] The first, second and third defendants deny that the plaintiffs have acquired any NCR to the areas claimed by them for the reasons noted by the learned judge in his judgment. These reasons will be referred to when and if necessary.

[26] The defendants contend that the plaintiffs have not proved their NCR claim over the three parcels of land. However, after considering the evidence by the plaintiffs' witnesses (whose evidence have been challenged and severely criticised by the defendants and described as being uncorroborated, unconvincing, contradictory and based partly on hearsay evidence), the learned judge found that, on balance of probabilities the plaintiffs have lawfully acquired or created native customary rights as recognised by the Sarawak Land Code over the three parcels of land; and the learned judge also found that the lands which the plaintiffs have lawfully created NCR are included in the provisional leases issued to the first and second defendants. This is how the learned judge appraised the evidence in his judgment against the criticism by the defendants:

> The defendants criticised the evidence of the plaintiffs as being bare statements of interested witnesses, uncorroborated by other evidence and therefore unworthy of belief. The defendants said that even though the plaintiffs witnesses had described their individual parcels of land and gave the names of other residents who owned neighbouring parcels to them, those other persons were not called to confirm the evidence of the plaintiffs' witnesses. I find no merit in this complaint. Just because some of these village folk may not be able to read maps and pinpoint their parcel of land on a map does not mean that those parcels do not exist or they are not credible witnesses. There the first and second defendants show that human activity is focused outside and along the periphery of the project site. I do not agree. I find that the rubber tickets provide uncontroverted evidence that the plaintiff's forebears were farming those lands since 1955. The fact that the provisional leases issued to the defendants excludes those parcels of land covered by the rubber tickets does not change in any way, the fact that the parcels of land issued with rubber tickets fall within the boundary or 'garis menoa' of the land claimed by the plaintiffs as their native customary land.
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> The second source of corroborative evidence to the plaintiffs claim are the ariel photographs exhs D73A, D73B, D73C, D73D, D73E, D73F and D73G produced by the defendants themselves. According to the defendants, these ariel photographs which were taken in 1947 show two things: (a) there were areas under secondary growth in the areas claimed by the plaintiffs as their native customary land but these areas have been excluded from the area covered by the provisional leases and therefore not relevant to the plaintiffs case; and (b) the ariel photographs show that the other areas claimed by the plaintiffs at Sungai Meranggang, Sungai Tampoi and Sungai Skrang were covered by Primary Forest in 1947. Therefore the plaintiffs could not be exercising native customary rights in those areas. I do not agree. DW4 Mr Wee Kang Hian the Pembantu Teknik Ukur attached to the Lands & Surveys Department Headquarters, Kuching, Sarawak and whose duties included ten years of experience as a navigator for ariel photographs and interpretation of ariel photographs for land use maps, was requested to do a detailed analysis of the ariel photographs to determine the land use in the areas claimed by the plaintiffs. DW4 selected three ariel photos, 5144 (D73B) 5146 (D73D) and 5147 (D73E). In his analysis and write up which the court marked exhs P81 and P18A. In his analysis and write up which the court marked exhs P81 and P81A

(since they were admitted in evidence at the plaintiffs' request). PW4 indicated in different colours the type of land use found in the area in 1947. His write up states:

> The said area is coloured Purple for Horticultural Lands (Mixed Cultivation), shaded Purple for Rubber, Blue for Wet Padi, and coloured Orange for Secondary Growth, Grassland, Shifting Cultivation and Hill Padi.

This analysis provided by PW4 shows that from as early as 1947 the areas which the plaintiffs claim their forefathers had occupied was already cultivated with all the above crops. The defendants tried to make light of this fact by saying that the cultivated areas had been excluded from the provisional leases, but that does not alter in any way the compelling evidence afforded by the ariel photographs analysed in exhs P81 and P81A, that by 1947 the areas claimed by the plaintiffs as their native customary land was already cultivated by their forefathers with the crops mentioned in DW4's write-up. This in turn would indicate that virgin jungle must have been felled for that purpose. The fact that areas of virgin jungle can be seen between and next to the areas under cultivated in 1947 and also shown in more recent land use maps made in 1978 such as exh D35 attached to D79 produced by the defendants does not detract from but rather supports the evidence of PW1 that 'pulau's' are areas of forest and jungle within the boundary of their native customary lands which has abundance of useful timber, animals and jungle produce. This evidence also accords with what PW14 said about the adat Iban in clearing jungle for settlement and cultivation but leaving areas of virgin forest as pulau's within the pemakai menoa to provide the community with forest resources for domestic use.

Even though those early days, the 1947 ariel photographs and exh P81 and P81A show that there were three distinct and separate areas where cultivation occurred. When the plaintiffs witnesses were asked how they and their forebears got to the cultivated areas at Sungai Meringgang, which were the furtherest away from Kampung Lebor, they said it was by river through Sungai Tampoi than on to Batang Skrang and eventually on to Sungai Meringgang. It is noteworthy that this evidence was given by the plaintiffs witnesses well before DW4 gave his evidence and they had no means of knowing that what he would say would in effect support that evidence. Although the plaintiff's witnesses may have been unable to read maps or had made mistakes in describing the types of fruit trees or the crops that were damaged on their parcels of land, I accept them as credible witnesses as their evidence is supported by other credible evidence such as the rubber tickets and ariel photographs.

The defendants contended that the boundary of the plaintiffs' native customary land cannot extend to areas where the plaintiffs had roamed to forage for their livelihood. I do not find this to be so in the plaintiffs' case. None of their witnesses said that the boundary of their native customary land included areas where they roared to forage for their livelihood. When the community map exh P76A, which demarcates the boundaries of the plaintiffs native customary land is compared with the analysis of the ariel photographs in exh P81A, and the pelan annexed to the statement of claim marked 'A', it can be seen that the plaintiffs claim is limited to the areas cultivated by them and the areas regarded by them as their *pemakai menoa*, *temuda* and *pulau*.

[27] It is observed that in assessing the evidence by the plaintiffs' witnesses, the learned judge had taken less than strict approach. The learned judge said:

> Even though the historical account of how the plaintiffs came to settle and exercise customary rights over the areas of land they claim may be based on hearsay evidence the court must take a realistic approach in a case such as this when applying the rules of evidence. It would be unrealistic to insist on strict evidentiary standards to prove things which occurred many generations ago within a rural community.

[28] And the learned judge finds support for his approach in the passage by Haidar J (as he then was) on s 48 of the Evidence Act 1950 in the case of *Hamit b Matussin & 6 Ors v Superintendent Of Lands & Surveys & Anor* [1991] 2 CLJ 1524 at p 1526. We cannot find anything wrong with the approach taken by the learned judge.

[29] In his judgment, the learned judge dealt with several issues. However, the issue on the creation of NCR as mentioned above is one of the two most important issues in this case. The other issue which is closely related to the creation of NCR is the issue relating to the *pemakai menoa*. But this issue takes slightly different form. The important question that begs this issue is not how it is created but whether the Sarawak Native Customary Law recognise *pemakai menoa* as part of Sarawak native customs within the concept of NCR.

[30] Before we discuss the issue relating to the *pemakai menoa*, we will say something about the interveners. There are three interveners in these appeals. The first two interveners are TH Pelita Sadong Sdn Bhd (formerly known as DD Pelita Sadong Plantation Sdn Bhd) ('PSSB') and TH Pelita Gedong Sdn Bhd (formerly known as DD Pelita Gedong Plantation Sdn Bhd) ('PGSB'). PSSB is the intervener in the Luking appeals and also in the Nyutan appeals. PGSB is the other intervener in the Nyutan appeals. These two interveners are the registered holders of the lease over Lot 2979 Melikin Land District but not a party to the proceedings in the High Court. The application to intervene in these appeals has been allowed earlier by this court.

[31] At the hearing of these appeals, we also heard two applications by the proposed third intervener who is the chargee of the land under the provisional lease having granted a facility of RM660m to the registered lease holders of the land. The third intervener is RHB Bank. They had filed application in encls 23a and 30a to intervene in both the appeals. Though the lead state counsel Dato' JC Fong attempted a feeble objection to the application, the other appellants in the appeal have either indicated that they took a neutral stand on the two applications or had agreed to encls 23a and 30a. The respondent however objected to the applications. After hearing counsel, we gave order in terms of encls 23a and 30a with the agreed cost of RM3,000.

[32] Now to return to the issues in these appeals. State legal counsel ('the learned SLC') submitted two issues. The first issue is the meaning of NCR under Sarawak laws and whether it includes *pemakai menoa*. The second issue is whether NCR can be created over riverbank reserves.

[33] Learned SLC submitted that NCR lands are limited only to the area under cultivation and under continuous occupation. It does not include virgin jungle. It was submitted that the learned judge in Luking appeals equated native customary rights over land to the Iban custom of *pemakai menoa* – an Iban term that refers to 'a territorial domain of a long house community where customary rights to land resources was created by pioneering ancestors'. This finding by the learned judge is based on the expert evidence of PW2, Nicholas Bawin. Learned SLC contends that such finding is incorrect. He submitted that there is a significant difference between 'native custom' and 'native customary law' and that the law does not give effect to every native custom; and only those customs to which the law gives effect, to form part of the customary law of the State of Sarawak and are covered by the definition of 'law' in art 160(2) of the Federal Constitution. Thus, it was argued and submitted for the appellants in these appeals that the law in Sarawak only recognises *'temuda'* ie land brought under cultivation through felling of virgin jungle and in continuous occupation of the natives give rise to rights over land. The paramount issue in these appeals according to learned SLC is whether the custom of *pemakai menoa* falls within the definition of law in art 160(2) of the Federal Constitution or the definition of customary law in the Sarawak Land Code and the Native Courts Ordinance (Cap 43, 1958 Ed) which came into force on 1 September 1955.

[34] Learned counsel for the appellants contends that it does not. We were referred to various writings, orders and ordinances applicable in Sarawak since 1939 and this include a passage from AF Porter's book 'The Development Of Land Administration In Sarawak From The Rule Of Rajah Brooke To The Present Time (1841–1965)' quoted by the Federal Court in *Superintendant of Land And Surveys Miri Division And Anor v Madeli bin Salleh (suing as Administrator of the Estate of the deceased, Salleh bin Kilong)* [2008] 2 MLJ 677; [2007] 6 CLJ 509, which speaks of a body of customs known by generic term Indonesian Adat in reference to a system of land tenure originating in and supported by customary law. This Indonesian Adat has been authoritatively stated in the Sarawak Secretariat Circular No 12 of 1939 dated 21 November 1939 signed by the Chief Secretary. The circular recognises that the customary tenure of land practiced in Sarawak at that time is the right to cultivate cleared land vests in the community with priority to the heirs of the original feller of big jungle evidence by existence of permanent cultivation of reasonable density.

[35] However, it was also submitted for the appellants that based on writings by AJN Richards in 'Report On Land Law & Anor' published in November 1961, not all native customs give rise to rights to land or is part of customary law relating to customary land tenure over land. It was submitted that AJN Richard's definition of 'custom' is consistent with the definition of law in art 160(2) of the Federal Constitution which includes any custom or usage having the force of law in the Federation or any part thereof. It was argued that the customary law in Sarawak only refers to customs which the laws of Sarawak recognise; and only these customs have the force of law.

[36] Going by the above argument, it was submitted that Sarawak laws as contained in the various executive orders issued during the Rajah Brooke's days (Rajah's Order 1875, the Fruit Trees Order 1989, Land Order 1920 (s 21), Supplementary to Land Order No VIII 1920 (s 2), Rajah Order L-7 of 1933 (s 66 of the Land Settlement Ordinance), Secretariat Circular No 12/1939, Tusun Tunggu (sea Dayak/Iban codes of fines) and s 5(2) of the Sarawak Land Code (Cap 81)) recognise only the 'temuda' as native customary rights over land. 'Temuda' is a process whereby virgin jungle was cleared for farming and occupation by a native, and the land that had been cleared is under continuous occupation.

[37] Learned SLC took us through several cases on the issue of 'temuda' decided by the Native Court of Appeal which is the highest court in the native court system of Sarawak in his written submission, and submitted that the Native Court of Appeal had consistently declared that customary rights to land is established by whoever fells the primary jungle and cultivates thereon, (see *Galau & Ors v Penghulu Imang & Ors* [1967] 1 MLJ 192, *Sumbang ak Sekam v Engkarong ak Ajah* [1958] SCR 95 and *Injing v Tuah & Anor* [1971] 1 MLJ 115 at p 116).

[38] Learned SLC also referred to certain passages in *Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal* [2006] 1 MLJ 256 at pp 273–275; [2005] 3 CLJ 555 at pp 572–573 where the court said that the natives' NCR claim in that case 'must be confined to the areas where they occupy continuously for cultivation. It does not include areas, within half a day's walking distance from a longhouse, where the natives went to collect their resources from the uncleared forests, under the concept of *pemakai menoa* which no order, proclamation or statute has given recognition or which do not have the force of law'.

[39] In *Bisi ak Jinggot @ Hilarion Bisi ak Jenggut v Superintendent of Lands and Surveys Kuching Division & Ors* [2013] 5 MLJ 149, Suriyadi FCJ, delivering the judgment of the court held that the creation or acquisition of NCR over land must be in accordance with the customs and recognised

practices of a particular community. For the Iban, the customs is codified in Tusun Tunggu which recognised only the 'temudas'.

[40] Thus, it was submitted that the learned judges in these appeals have erred when they ruled that the plaintiffs had rights beyond the areas they had cleared and brought under cultivation and therefore had wrongly applied the native customary law of the Iban community in Sarawak. It was argued, therefore, that it follows from the above submission that the order of rectification ie for the defendant (the State Government of Sarawak and the Superintendent of Lands and Survey) to exclude the natives *pemakai menoa* it being the plaintiffs NCR from the provisional lease is equally wrong and should be set aside.

[41] As for the other defendants (the registered provisional lease holders), they associated themselves with the submission by learned SLC on the issue of *pemakai menoa*. Their main submission focused mainly on the creation of NCR by the plaintiffs in this case. This submission concerns mainly the evidence and the finding of facts by the trial judges. We will say more on this in the later part of this judgment.

[42] Related to the issue of the area claim by the plaintiffs, learned state counsel also submitted that part of the area claimed include river bank reserve about the size of one km long running along the banks of Sungei Tampoi. It was submitted that no NCR could be claimed over reserved land.

[43] In response to the submission by the defendants, learned counsel for the plaintiffs submitted that it is contrary to established authorities to say that *pemakai menoa* should not be recognised in law because its creation does not have the force of law as envisaged in the express 'law' in art 160(2) of the Federal Constitution. He submitted that the creation of *pemakai menoa* and *garis menoa* (and this includes the *pulau galau*) is Iban adat or usage.

[44] Learned counsel cited *Anyam & Anor v Intan* [1948–1949] supp MLJ 13, a case of estate distribution according to the Muhammadan law and the Malay custom, where it was held that under s 184(iii) the expression 'having force of law' in Muhammadan law and the adat. In another case *In Re Haji Mansur bin Duseh alias Matso bin Duseh decd* [1940] 1 MLJ 110, the court said that for the purpose of s 184(iii) of the Probate and Administration Enactment, *'a body of unwritten law, that is customary law known as adat'* exist until the contrary is established. Mohd Noor Ahmad J (as he then was) in *Sagong bin Tasi & Ors v Kerajaaan Negeri Selangor & Ors* [2002] 2 MLJ 591, observed at p 618 that:

Apart from the orang asli and the native people of the Borneo states, there are no other classes of people in Malaysia who occupy the said lands on the basis of customary rights, except the lands under the tribal adat in Negeri Sembilan and Malacca.

[45] Learned counsel also referred to the judgment by David Wong J (as he then was) in *Mohamad Rambli bin Kawi v Superintendent of Lands Kuching & Anor* [2010] 8 MLJ 441, where the learned judge held, inter alia, that the Federal Constitution gives protection to NCR through application of art 160(2) of the Federal Constitution. The learned judge said, at pp 469–470 of the law report, as follows:

> [49] Whether natives in Sarawak have the right of disposition of NCR land, in my view, must be considered in the context of their customs and traditions together with the Federal Constitution. The reason is simple and that is the Federal Constitution gives protection to NCR. The first of such protection in art 160(2), which defines law to include 'customs or usage having the force of law in the Federation or any part thereof'. What this means is that if, as in this case, the custom of the Malay communities allows disposition of land with NCR among themselves the court is constitutionally bound to protect that custom. This is how Dr Ramy Bulan in her paper titled 'Legal Perspectives On Native Customary Land Rights in Sarawak' puts it at p 151:
>
> > The denial of customs supporting native property rights on the basis that they are different from non native property holding patterns not only violates art 160(2) by failing to recognize customs as part of Malaysian law, it also violates the right of natives to equality before the law, guaranteed by art 8(1) of the Federal Constitution. The failure to provide for registration of native title and to accord indefeasibility to registered interest could similarly violates art 8(1)
>
> [50] There is much merit in what Dr Bulan says and I adopt her view ...

[46] Based on the above authorities, learned counsel for the respondent submitted that the treatment of arts 160(2) and 8(1) of the Federal Constitution by the courts demonstrates that these provisions incorporate common law principles that are largely not legislated which include recognition of local customs. Therefore, it was submitted, the learned judge did not err in giving a wider interpretation to the phrase 'having the force of law' in art 160(2) of the Federal Constitution to include common law doctrines, Malay tribal customary laws (*adat perpateh*) and the aboriginal and native customary land rights and in finding that Iban custom has the force of law.

[47] At this juncture, we will observe that it is not the defendant case that the creation of *pemakai menoa* or *garis menoa* is never part of Iban custom. The only complaint by the defendants is that the particular Iban customs never have the force of law under art 160(2) of the Federal Constitution. We must say that the expression 'having the force of law' in art 160 of the Federal Constitution

must not be read to confine only to statute law or legislative orders. It must also encompass, in our view, the Malaysian common law developed through the cases decided by our courts especially the appellate and the apex court.

[48] It is noted that the Federal Court's decision in *Bisi ak Jinggot* (above) cited by the appellants, did not discuss the issue whether *pemakai menoa* is part of Iban custom or whether its creation has the force of law. The main issue discussed in *Bisi ak Jinggot* (above) is the untitled land known as *temuda* cleared by the natives of Sarawak of Dayak origin for *padi* farming and whether such land is capable of being inherited or transfer by sale. At the Court of Appeal, it was recognised that under the Iban system of *Tusun Tunggu* there are only two modes or acquiring customary rights over land – one is felling a virgin jungle and planting crops thereon to create the 'temuda' and the other is by gift or inheritance. Both modes were approved or endorsed by the Federal Court in the same case.

[49] The concept of *temuda*, *pemakai menoa* and *pulau galau* was first discussed at great length by Ian Chin J in the celebrated case of *Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 6 MLJ 241. One of the issue in that case was that the Ibans could only claim rights to *temuda* as provided in the Tusun Tunggu or its successor the Adat Iban 1933. But the trial judge, after examining the various orders, decrees of the white Rajah Brooke and the writing of various authors claiming to be experts on Sarawak natives customary law and customary rights concluded at p 797:

> Thus far, the native customary rights of an Iban associated with the terms 'temuda', 'pemakai menoa' and 'pulau galau' have not been abolished. They have survived through all the Orders and Ordinances. It is not surprising given the attitude of the First Rajah which has been commented on by various authors. It has been said that though Sarawak was ceded to James Brooke and with it the proprietorship and sovereignty over the land, he had shown a consistent respect for native customary rights over land (see Anthony Porter – 'The Development of Land Administration in Sarawak from the rule of Rajah James Brooke to the present time (1841–1965)'). In fact James Brooke had referred to native customary rights as 'the indefeasible rights of the Aborigines' (see John Templer – 'The Private Letters of Sir James Brooke, KCB, Rajah of Sarawak'). James Brooke was 'acutely aware of the prior presence of native communities, whose own laws in relation to ownership and development of land have been consistently honoured' (see Anthony Porter, p 16).
>
> In my view there is another obvious though unmentioned reason for not attempting to prohibit entirely native customary rights. During the reign of the Rajah he has to contend with rebellions after rebellions of various native groups and he was able to convince one group to go on war expeditions on his behalf against the other. The exploits of Munan ak Minggat is an example (see *Robert M Pringle's Thesis on The Ibans of Sarawak Under Brooke Rule 1841–1941*). If the Rajah had abolished all those rights he would have united all the natives and he would have a war against him by a united front made up of all the natives of Sarawak. His head would have

A been the trophy that would be sought, it being the custom of that time to take the head of an enemy. To put it another way, the Rajah cannot afford to abolish those rights given the ability of the like of Munan to lead his people.

B **[50]** In the same case, Ian Chin J also held (at p 800) that the recognisance or existence of NCR is 'not dependent on statutes, or any legislation, executive or judicial declaration'. The customary rights however could be extinguished by express provision in the statutes, legislation or executive orders. However, His Lordship concluded after he had gone through those relevant legislation and orders, that none of them had extinguished the creation of *temuda*, *pemakai* C *menoa* and *pulau galau* as part of native customs and rights in Sarawak though they restricted their creation.

D **[51]** The arguments by the appellant in this appeal to persuade us to decide that the Iban custom of creating *pemakai menoa* does not have the force of law under the Sarawak laws are the same arguments that were raised in *Nor Anak Nyawai* case. Those arguments have been rejected by the court. In fact on appeal, Ian Chin's J decision was affirmed by the Court of Appeal in *Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and* E *another appeal* [2006] 1 MLJ 256; [2005] 3 CLJ 555. Following on the footsteps of *Nor Anak Nyawai* are several other cases decided by the High Court in Sarawak. In *Agi ak Bungkong & Ors v Ladang Sawit Bintulu Sdn Bhd & Ors* [2010] 4 MLJ 204 David Wong J (as he then was) said at p 215:

> [15] However counsel for the defendants contends that as 'Pemakai Menoa' is not F listed in the Adat Iban 1993 codification of Iban customary custom and practice or in any of the statutes (which is not disputed) and hence not recognised by statue, the law should not give recognition to it or used by the court to confer NCR on the lands. The same argument was made by the then learned state attorney general in *Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 6 MLJ 241 G which was rejected by both the High Court and Court of Appeal. Both courts held that native title requires an examination of the customs and practices of each individual community and this involves a factual inquiry and not whether the customs appear in the statute book. This view is consistent with the intention of Federal Constitution as native customs are accorded the status of law under art 160(2) of the Federal Consitution which defines law to include 'custom or usage H having the force of law in the Federation or any part thereof'. In that case the view of the Court of Appeal differs from the High Court only in respect of the factual evaluation of evidence in which they found that the plaintiffs there had failed in proving 'Pemakai Menoa' in the disputed area.
>
> [16] Accordingly, I reject counsel for the defendants' contention that there cannot I be NCR unless the same is embodied in statutes.

[52] Learned counsel for the respondents draws our attention to some of the cases that had followed *Nor Anak Nyawai* on the issue of *temuda*, *pemakai menoa* and *pulau galau* and recognising them as part of Iban customs in

creating NCR. These cases are: *Luking Uding & Ors v Superintendent Of Lands and Surveys Kota Samarahan Division & Ors* [2011] 7 CLJ 342; *Muli Anak Baya & Anor v Everbright Enterprise Sdn Bhd* Civil Suit No 21–6 of 2009 (unreported); *TR Gayan Anak Tupai & Ors v Vita Hill Sdn Bhd & Ors* Civil Suit No 21–4 of 2009 Sibu High Court (unreported) and *Usang Labit & 3 Ors v Rosebay Enterprise Sdn Bhd & 2 Ors* Civil Suit No 21–1 of 2010 Sibu High Court (unreported).

[53] It is interesting to note that in *Nor Anak Nyawai*, the trial judge had relied on the expert evidence of Nicholas Bawin ak Anggat ('Nicholas') on the customs and practices of the Ibans in Sarawak and accepted the evidence that the natives customary rights in Sarawak extend to *pemakai menoa*, *garis menoa* and *pulau galau*; not simply confined to *temuda*. His evidence was accepted by the Court of Appeal. The Federal Court in *Superintendant of Land And Surveys Miri Division And Anor v Madeli bin Salleh (suing as Administrator of the Estate of the deceased, Salleh bin Kilong)* [2008] 2 MLJ 677; [2007] 6 CLJ 509 had also approved Nicholas Bawin's expert evidence on natives customs and practices in Sarawak. Nicholas had also gave evidence in other NCR cases that came to court after *Nor Anak Nyawai*. More importantly, for the purpose of this appeal, he also testified in the Lukings and the Nyutan appeals. The trial judge in both the appeals accepted his expert evidence on the natives customs and practices in Sarawak in relation to the creation of natives customary rights over lands.

[54] In the Nyutan appeals, Nicholas testified for the plaintiffs as PW14. Nicholas is an Iban and was, at the time of giving evidence, the Deputy Head of Majlis Adat Istiadat Sarawak. He had been in that position since 12 August 1992. Nicholas obtained his knowledge in Adat Iban through his experience, learning, reading and studying of Adat Iban. The learned judge found on evidence that Nicholas's works with the Majlis Adat Istiadat Sarawak requires him to study and record the Adat Iban. Nicholas testified that pioneering families of Iban would fell virgin forest for settlement and farming after which the community can establish its rights to the felled areas. It is Nicholas's evidence that a *pemakai menoa* encompasses an area of land held by a distinct longhouse or village community, and includes farms, gardens, fruit groves, cemetery, water and forest within a defined boundary or *garis menoa*. A *pemakai menoa* also includes *temuda* which is cultivated land which is left to fallow, *tembawai* or old long house sites, and *pulau* or patches of virgin forest that have been left uncultivated to provide the community with forest resources for domestic use. As a general rule, the household within the community that first felled the forest secured rights over specific areas of land. Those rights are heritable, passing ideally from one generation to generation of household members. According to PW14 (Nicholas) where several pioneering villages occupied a general area, boundaries (*garis menoa*) are drawn between villages.

These boundaries followed streams, watersheds, ridges and permanent landmarks.

[55] The above evidence of PW14 Nicholas the expert, was accepted by the trial judge. Alan Clement Skinner J (as he then was) in Nyutan appeals said:

> I accept what PW14 said about the adat Iban above. I accept it that from the various ways he has come into this knowledge, he is able to give evidence on the matters related by him.

[56] In Luking appeals, Nicholas also testified for the plaintiffs as PW2. He gave similar evidence as in the Nyutan appeals on Iban customs and practices and in particular on the creation *temudas* and *pemakai menoa*. Linton Albert J (as he then was) the trial judge in the Luking appeals accepted PW2, the expert testimony and taken together with the evidence of the other plaintiffs' witnesses (mostly natives) and rejected the contention by the defendants that the plaintiffs had roamed or foraged the areas in *pemakai menoa* in search of food and that they were not in continuous occupation of the area marked as *pemakai menoa*. The learned judge said in his judgment:

> Even though the historical account of how the plaintiffs came to settle and exercise customary rights over the areas of land they claim may be based on hearsay evidence the court must take a realistic approach in a case such as this when applying the rules of evidence. It would be unrealistic to insist on strict evidentiary standards to prove things which occurred many generations ago within a rural community.

[57] With regard to the issue of whether the plaintiffs in Luking appeals and Nyutan appeals have proof their claim for NCR, one must borne in mind that the respective trial judge had heard and recorded the evidence of the witnesses, particularly the plaintiffs' witnesses firsthand. They believed and accepted their evidence. In the circumstance, the appellate court should be slowed in departing from the trial judge's finding and conclusion of facts based on those evidence.

[58] For instance, in the Nyutan appeals the learned trial judge had said this on PW1's evidence:

> It is PW1's evidence that during the reign of the Sultan of Brunei the Renum or Melikin Sea Dayaks paid yearly tributes in the form of 'Ai Pinang' to the Sultan. The Sultan gave the first 6 Renum Chiefs the title of Orang Kaya, which title, when the British took over, became known as a Penghulu. During one of the visits of Orang Kaya Sago, a Renum Dayak Chief, to pay tribute to the Sultan of Brunei, the Sultan gave Orang Kaya Sago a handful of Tanah Keramat as a symbol that the Renum Dayaks were his subjects and under his protection. The plaintiffs' ancestors then created the 'Guna Gayau' in the shape of a crocodile at a site about four kilometres from Kampung Lebor. The heart of 'Guna Gayau' was made out of the Tanah Keramat given by the Sultan of Brunei. Till today, every year a ceremony called

'Enselan Guna' is performed to offer food and thanksgiving to the spirits of 'Guna Gayau' in the belief that the welfare of the people of Kampung Lebor will be looked after.

Besides the Tanah Keramat, the Sultan of Brunei is also said to have presented to Orang Kaya Sago a wooden door, a Tombak (spear) and a keris. The spear and keris have since gone missing but the wooden door with its carvings of a dragon and snake are still kept at 'Rumah Guna'.

PW1 testified that their ancestors left many important landmarks and sites where they settled and occupied, which are to be found within the area claimed by the plaintiffs as their native customary land. Thus, besides numerous Tembawai which were the sites of settlement during the time of various Orang Kayas, Pendam Serias is the earliest burial ground as well as the site of a Pulau (a term explained shortly) which is sacred to the residents of Kampung Lebor. According to PW1, Punjong Berut is the site where the original belian peg was planted to show the extent of the Rajah's authority to the plaintiffs' land which can still be seen today. PW1 also referred to another site of significance called Tapang Tanah Keladan where the brother of Orang Kaya Daka, one Igin was the pioneer to open up this area where the Tapang Keladan tree is found and still growing there. It is PW1's evidence that the areas which their ancestors occupied, cultivated and lived upon subsists until today. According to PW1 the present residents of Kampung Lebor are mostly farmers who plant padi, vegetables, rubber, pepper and other crops for their own consumption and as a source of income. The plaintiffs also hunt in their 'pulau' which are areas of forest and jungles, which aside from those which are sacred grounds, have abundance of useful timber, fruit trees, animals and other jungle produce. The plaintiffs also fish in the rivers within their 'pemakai menoa' which is a communal land, comprising of a 'pulau' and 'temuda' or farmland. Therefore, PW1 testified that to the plaintiffs, their 'pemakai menoa' or lands and forest over which they claim native customary rights is not just a source of livelihood but also constitutes life itself as the land and forest is also fundamental to their social, cultural and spiritual aspects as natives.

PW1 further testified that the residents of Kampung Lebor exercise their native customary rights over the lands which they claim as their native customary land within a defined boundary only, the extent and location of which is marked by rivers, mountain ridges, particular trees and other important landmarks, which is known to the residents of Kampung Lebor. These boundaries separate their native customary lands from that of other native communities who also claim to exercise customary rights over areas they claim.

[59] With regard to the mapping and demarcation of the areas claimed by the plaintiffs as their NCR, the learned trial judge in the Nyutan appeals appraised the evidence as follows:

It was the evidence of PW1 that in February 2003 a working committee was at up from the residents of Kampung Lebor to produce a proper map of the boundaries of their native customary land. For this purpose they invited one Nicholas Mujah Ak Ason to assist them to survey their native customary land. PW1 testified that they held two meetings with Nicholas Mujah and in March and April 2003, PW1 and other members of the working committee walked the whole length of the boundary

of their native customary land, indicating to Nicholas ak Mujah numerous places of historical and cultural significance to the plaintiffs within the boundary of their native customary land.

Mr Nicholas Mujah ak Ason ('PW12') confirmed what PW1 had said on the matter. PW12 testified that he has worked with the Sarawak Dayak Iban Association and attended numerous workshops and seminars on community mapping organized and conducted by Sahabat Alam Malaysia and Borneo Research Institute, Malaysia. Through those attendances, PW12 learned the methodology and techniques of mapping which included the operation of GPS (Global Positioning System) equipment, how to operate these equipment to collect GPS data and for surveying, the setting of co-ordinating points, how to do plotting on a topographic map, how to count the acreage of land surveyed and how to transfer GPS data into the GIS (Geographic Information System). PW12 said he had undertaken mapping work for 11 other rural native communities besides that of Kampung Lebor. PW12 testified that he used a Garmin brand GPS to take readings at some 77 co-ordinate points to determine the boundary of Kampung Lebor. The data collected by him were entered into a note-book (exhs P72(1)–(12)), where the co-ordinate points had names or where the committee members gave names of rivers, hills, 'tembawai' or 'pendam', these data were also recorded in the note book. I accept PW12's evidence. Although he admitted in cross-examination to making errors in some of his recordings, I did not regard them as material nor affecting the overall accuracy and reliability of his mapping work.

PW12 handed all the data he had collected for the boundary map of the plaintiffs native customary land to Mark Bujang ('PW13') who graduated with a degree of Bachelor of Science Geology, during which course of study he was trained to produce scaled geological maps. PW13 works as a programme and community mapping coordinator. He has worked with native communities of Sarawak to demarcate their native customary land boundaries. PW13 testified that from the data he received from PW12 (Nicholas Mujah ak Ason), he produced a map drawn to scale showing the boundaries of the plaintiffs' native customary lands which the court marked exhibit P76. This is the same as the map found in the Bundle of Disputed Documents ('BDD') which the court eventually admitted into evidence and marked exh P76A. I accept the evidence of PW13. I also accept that the scale maps produced by him are reliable and accurate.

When exhibit P76, exhibit P76A and the plan attached to the plaintiffs' statement of claim are compared, it cannot be denied that parts of the areas claimed by the plaintiffs as their native customary land is covered or comes within the three parcels of land alienated to the first and second defendants.

[60] Likewise, Linton Albert J, the trial judge in Luking appeals, after referring to the definite statement of law by the Federal Court in *Superintendant of Land And Surveys Miri Division And Anor v Madeli bin Salleh (suing as Administrator of the Estate of the deceased, Salleh bin Kilong)* applicable to the determination of claims to native land under native customary rights and the proposition of law by Ian Chin J on the establishment and creation of *pemakai menoa* in *Nor Anak Nyawai* (above) said that:

Since the plaintiffs claim to native land under native customary rights was acquired prior 1 January 1958 the strictures imposed by (Sarawak) Land Code for the creation of native customary rights over land after that date have no application and do not therefore, fall to be determined.

[61] Then the learned judge went on to say:

In this action, quite apart from proof established by exh P13, proof of the plaintiff's pemakai menoa was readily available from the oral testimonies of their witnesses which are adumbrated above coupled with the evidence of DW4 who was understandably untruthful as to the size of the cleared area of 38 hectares, nevertheless, showed that the plaintiffs had been in occupation within their pemakai menoa since 1954. In his analysis of the photographs under exh D20, Claus-Peter Gross (PW11) PhD and Diploma in Forestry whose qualifications and experience encompass remote sensing applications for forest and land use inventories, environmental monitoring, thematic mapping, image interpretation, establishment of GIS database, training of experts, project management, project evaluation in more than ten countries, gave the following conclusions:

Aerial photo interpretation 1954	
Polygon features	
Primary Forest	4153 ha
Disturbed Forest	395 ha
Poor Forest	117 ha
Regeneration Forest/Shrubs	225 ha
Clearing /Agriculture	437 ha
	Sum 5327 ha
Line features	
1 Longhouse	40m

I have no hesitation in preferring the interpretation of PW11 over that of D4 not least because unlike DW4 who was a minor functionary in the State Civil Service PW11 was not laboring under any constraints real or imagined and arrived at a reasoned analysis of the aerial photographs in D20.

...

It was never remotely suggested that the plaintiffs and their ancestors had 'roamed or foraged' the areas in their 'pemakai menoa' in search of food. It was clear that the plaintiffs from the time of their ancestors had been in occupation of their 'pemakai menoa' which followed a defined boundary based on permanent landmarks which separated Kampung Merakai from the 'pemakai menoa' of neighbouring villages whose own 'pemakai menoa' were contiguous to that of Kampung Merakai and witnesses from these other villages gave credible testimony of the long established 'garis menoa' delineating the 'pemakai menoa' from their respective ancestors. Thus, applying the principles I have set out to the evidence adduced by the plaintiffs and defendants adumbrated I am satisfied that it is more probable than not that the plaintiffs have established their native customary rights to the 'pemakai menoa'

which they claim, in accordance with the civil standard of proof required under s 101(1) of the Evidence Act 1950 which states:

> Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.

In the circumstances, the defendants contention that the plaintiffs do not have customary rights over the land claimed or that the same falls outside the provisional lease are demolished because quite apart from the precise delineation set out in exh P13, the description of the plaintiffs' 'pemakai menoa' given by their witnesses contain sufficient particulars to demarcate the plaintiffs' 'pemakai menoa' with the degree of certainty to sustain their claim over the 'pemakai menoa' which is clearly within part of the provisional lease issued to the first and second defendants under Lot 2979 Melikin Land District.

[62] As to the creation of the *pemakai menoa* and the fixation of the 'garis menoa' in the Luking and Nyutan appeals, we are of the view that this is largely a determination and finding of facts by the trial judge. On the evidence of plaintiff witnesses which comprises mainly the natives who were born and brought up in the longhouses within the area claimed by the plaintiffs, we are satisfied that there is ample evidence for the trial judge to come to a conclusion that the plaintiffs have proved and established their NCR the disputed area of land before 1 January 1958.

[63] However, we are in agreement with the submission by learned lead state counsel Dato' JC Fong that part of the land claimed by the plaintiffs in these appeals which formed the river reserved ought to be excluded from the claimed area.

[64] With respect to the submission by counsel for the other appellants, the original provisional lease holders and their successor in title, they associated and adopted the submission by learned lead state counsel on the first issue which is the question of law whether the claim and creation of *pemakai menoa* have the force of law under the Sarawak laws.

[65] However, with regards to the second issue whether the plaintiffs have proved their claim, counsel for the respective provisional lease holders raised additional arguments.

[66] Learned counsel for third and fourth defendant in Luking appeals (Appeal Nos 166 and 756) Lembaga Pembangunan dan Lindungan Tanah and Nirwana Muhibbah Sdn Bhd Mr Shankar Ram, for example, argued that the learned judge erred in holding that the NCR still subsists when the area involved had been declared a mixed zone land vide Declaration Order 1998 and the declaration has not been invalidated. We have two comments on this

argument. Firstly, the declaration was made in 1998 whereas the trial judges found that the plaintiffs have acquired their NCR before 1958. Secondly, the declaration does not extinguish the NCR. It is a settled principle at common law that extinguishment of native customary rights can be done only by express statutory provision. The other aspect of Mr Shankar Ram's submission is related to proofs of the claim. As we have said earlier, this is a matter of evidence before the trial judge and the finding of facts by him on those evidence. We do not think that we should disturb it hastily.

[67] Learned counsel for the first and second defendant Lembaga Pembangunan Dan Lindungan Tanah and Nirwana Muhibbah Sdn Bhd – in Nyutan appeals Mr Ivan Hussein raised the issue that his clients has indefeasibility of title under s 132 of the Sarawak Land Code in respect of the provisional leases issued by the third defendant the State Government of Sarawak because they had paid the premium on the land. He argued that this indefeasibility of title can only be defeated if there is fraud involved in the issuance of the provisional leases, (see *Kho Kwang Choon v Phuman Singh* [1968] 1 MLJ 183). However, he said in this case no fraud was pleaded and none was found by the trial judge. The other point raised by the learned counsel is with regard to the river bank reserves along the river bank along Sungai Tampoi, Sungai Krang and Sungai Meringgang. He pointed out that the reserve is provided under s 38(1) of the Sarawak Land Code. In relation to this, he pointed out to us that the respondent's action is a representative action claiming for communal rights to their natives customary land. But, in so far as the claim to areas along the river bank, the claim was by individuals where only some testified in court. With regard to the ratification order given by the trial judge directing the state government to rectify the land register to comply with the court order declaring the land as NCR, learned counsel pointed out that the respondent had not produced sufficient material for the registrar to carry out the ratification exercise. In our view, the issue of indefeasibility of title is dependent on the finding of fact whether the plaintiff had proved their NCR claim, which in this case the trial judge had found to be so. Therefore, in our opinion the area which the court had found to be NCR land must be excluded from the provisional leases. For that reason, the court had made the ratification order for the state government to rectify the register so that the land that is declared to be NCR can be excluded.

[68] Learned counsel for the first and second interveners – PGSB and PSSB – in Appeal No 137 submitted on the issue of evidence and proof of claim which we have already said that we would not intervene. The other issue which they submitted is that the interveners rights to lease of state land Lot 2984 Melikin Land District is indefeasible under the Sarawak Land Code because the interveners were bona fide purchaser for value of the lease from the original lease holders without notice of the NCR. We do not find any substance in this

argument because it was never proven by the appellants that the NCR had been extinguished. In our view, the purchaser of the lease took the lease together with the NCR attached to the lands. On the issue of limitation raised by Mr Lee in his submission we do not think that it can be sustained. Under the Sarawak Limitation Ordinance any claim on interests in land the limitation period is 12 years from the date the cause of action arose. The plaintiffs in both the Luking and the Nyutan appeals have filed their claim well within that time limit.

[69] With regard to the third intervener RHB Bank, the submission is that firstly, they had not been heard in the High Court. Secondly, their interest will be adversely affected because they have provided financing in the form of banking facilities of RM66m upon the security of Lot 2984 in the Nyutan appeals. So, it was argued by learned counsel for the third intervener that his client is the registered chargee for the land and had acquired interest in Lot 2984. Thus, the argument as to the indefeasibility of title would apply to his client. Again, we must say that the third intervener interest in relation to the land claimed by the natives as NCR is dependent upon the trial court's finding whether the NCR claim has been proven. We have said earlier that this was so based on the finding of facts by the trial judge. In other words, what we are saying is this; the provisional lease owner had charged the land to the third intervener. Based on the size and the location and other relevant factors which the chargee must have taking into consideration, the third intervener had agreed to provide the facilities of RM66m. With the finding by the trial judge that the plaintiff had proven their NCR, and with which finding we agree, the chargor and the third intervener must now reconsider the facilities by taking into consideration the fact that the court had ordered ratification of the register. It is pertinent to note that not the entire area covered by the provisional leases was declared by the trial court as NCR land. In the circumstances, the actual land area after excluding the land which the court found to be affected by NCR, the line size that is available to the chargee as security for the financing provided is now being reduced. This, in our view is a matter that is to be negotiated between the chargee and the chargor.

[70] For the above reasons, we dismissed all the five appeals with costs of RM10,000 against each of the defendants in each appeals, RM5,000 against each of the intervener in each related appeals. Deposit if any, be refunded to all appellants.

[71] My learned brother Ramly Ali and Mohd Zawawi Salleh JJCA had seen and read this judgment in draft; and had approved the same.

Five appeals dismissed.

Reported by Ashok Kumar